United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19054

JASPER B. PLOTT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

967

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MARVIN J. BRENNER
424 Fifth Street, N.W.
Washington 1, D.C.

Counsel for Appellant
(Appointed by this Court)

Washington, D.C.
February 15,1965

STATEMENT OF QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the lower court erred in sustaining an objection to appellant's question of the complaining witness on cross-examination namely, whether he had been engaged in such a fracas before at the Headquarters Bar.

2. Whether the lower court erred in sustaining an objection to appellant's question of the complaining witness on cross-examination namely, as to why the appellant was barred from returning to the Headquarters Restaurant.

I N D E X

TABLE OF AUTHORITIES

OTHERS

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19054

JASPER B. PLOTT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from a Judgment of the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

An indictment was filed on August 31, 1964, in the United States District Court for the District of Columbia charging appellant with an assault with a dangerous weapon under 22 D.C. Code § 502 and with possession of a prohibited weapon under 22 D.C. Code § 3214 (a). Jurisdiction was vested in the District Court by virtue of 18 U.S.C. § 3231.

Upon his plea of not guilty, appellant was tried and found guilty of both counts on October 12, 1964. Appellant's petition

for leave to appeal without prepayment of costs was granted by order of this Court on November 18, 1964. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant was tried before a jury on October 12, 1964, and convicted of possession of a prohibited weapon and assault with a dangerous weapon. The complaining witness, Mr. Robert Hickman, testified for the United States to the effect that he had been assaulted by appellant at the Headquarters Bar. On cross-examination, defense counsel attempted to attack his credibility by asking Mr. Hickman if this was the first time he was ever engaged in a fracas at that particular bar. (Tr. 49) This question was objected to by the prosecutor and sustained by the court. (Tr. 49)

During this same cross-examination, defense counsel elicited from the complainant the fact that he had not been back to the Headquarters Bar, the scene of the altercation, because he was barred from going there. (Tr. 49) However, when defense counsel attempted to discover the reason why the complaining witness was barred, the prosecutor again objected; and the court again sustained his objection (Tr. 49-50).

Appellant was found guilty of the crimes charged and was subsequently sentenced on November 13, 1964, to a term of imprisonment of two to seven years on the assault with a dangerous

weapon charge and one year on the possession of a prohibited weapon charge, the sentences to run concurrently. Appellant is currently incarcerated under that sentence.

STATEMENT OF POINTS

1. It was reversible error for the lower court to sustain the objection to appellant's inquiry on cross-examination of the complaining witness as to whether this was the first time the witness had been engaged in a fracas at the Headquarters Restaurant.

2. It was reversible error for the lower court to sustain the objection to appellant's inquiry on cross-examination of the complaining witness as to why the witness had been barred from going back to the Headquarters Restuarant.

SUMMARY OF ARGUMENT

Cross-examination is necessarily exploratory. Cross-examination directed at showing the bias or interest of the witness, particularly the complaining witness, is always relevant and should be allowed. Specific acts of misconduct are often held to be admissible in order to show an intent, motive, scheme or plan on the part of the witness. Prevention of all inquiry into fields where cross examination is appropriate is error.

Where appellant is limited in his cross examination to the

extent that he is prevented from making relevant inquiries of the complaining witness as to the witness's possible bias or his motive for testifying or his state of mind or his reputation for aggressiveness, prejudicial error has resulted.

Sustaining the prosecutor's objections was not "harmless error" because had the appellant been able to pursue his line of questioning, he might have successfully impeached the credibility of the complaining witness and thus changed the outcome of the trial.

ARGUMENT

BY LIMITING THE CROSS-EXAMINATION, THE COURT ERRED IN TWO WAYS. IT WAS REVERSIBLE ERROR FOR THE LOWER COURT TO SUSTAIN THE OBJECTION TO APPELLANT'S INQUIRY ON CROSS-EXAMINATION OF THE COMPLAINING WITNESS AS TO WHETHER THIS WAS THE FIRST TIME THE WITNESS HAD BEEN ENGAGED IN A FRACAS AT THE HEADQUARTERS RESTAURANT, AND IT WAS ALSO REVERSIBLE ERROR FOR THE LOWER COURT TO SUSTAIN THE OBJECTION TO APPELLANT'S INQUIRY ON CROSS-EXAMINATION OF THE COMPLAINING WITNESS AS TO WHY THE WITNESS HAD BEEN BARRED FROM GOING BACK TO THE HEADQARTERS RESTAURANT.

The general rule on the extent of cross-examination was stated by the Supreme Court in Alford v. U.S., 282 U.S. 687 (1931). There the Court held that the permissible purposes of cross-examination were that the witness might be identified with his community so that independent testimony could be sought and offered of his reputation for veracity in his own neighborhood; that the jury might interpret his testimony and that facts might be brought out tending to discredit the witness by showing that his testimony

in chief was untrue or biased.

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." Alford v. U.S., supra at 692.

Cross-examination of a witness is a matter of right. The Ottawa 3 Wall 268 (1865). It is a full and complete cross-examination that is the absolute right, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary. Lindsey v. U.S., 77 App.D.C. 1, 133 F.2d 368 (1942); Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668 (8th Cir. 1904); Gilmer v. Higley, 110 U.S. 47 (1884); Fahey v. Clark, 125 Conn. 44, 3A.2d 313 (1938).

In District of Columbia v. Clawans, 300 U.S. 617 (1937) the Court held that reasonable restriction of undue cross-examination was necessary. However, the court stated:

> "But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances on the commission by the accused of the acts relied upon for con-viction, passes the proper limits of discretion and is prejudicial error." District of Columbia v. Clawans, supra at 362.

This Court has held that

> "it is proper to permit upon cross-examination the bringing out of anything tending to contradict, modify, or explain the testimony given by a witness on his direct examination, or any logical inference resulting from it". Washington R. & E. Co. v. Dittman, 44 App. D.C. 89 (1915) at 92; Atlanta Greyhound Liner v. Isabelle, 81 App. D.C. 221, 157 F.2d 260 (1946).

In Mintz v. Premier Cab Ass'n., 75 App. D.C. 389, 127 F.2d, 744 (1942), a civil case, the appellee asked appellant on cross-examination whether or not she had been in a similar accident in a Diamond cab, and made claim for injuries, about two years before; also whether or not she had fallen in a beauty parlor, and made claim for injuries, about April, 1937. Appellant admitted making those claims and appealed on the ground that these prior claims were irrelevant and should have been excluded.

This Court held that a jury could discount or disregard testimony which ran counter to normal experience, and to show that it ran counter to normal experience tended to contradict it.

> "Fortuitous events of a given sort are less likely to happen repeatedly than once. The fact that a witness has told several stories involving similar fortuitous events tends, therefore, to create a conflict between his testimony and normal experience. So it has been held that one who furnishes an alibi for a criminal defendant may be asked whether he has furnished other alibis for the same defendant; one who accused a man of robbing him while he was drunk may be asked whether he has made the same charge against other men; the prosecuting witness in a rape case may be asked whether she has made similar

> charges against other men; and a purchaser who rejects a seller's goods as inferior may be asked whether at about the same time, he cancelled orders with other sellers. This type of evidence, like many other types, may create prejudice but it is believed to be worth more than it costs." 75 U.S. App. D.C. at 389-390, 127 F.2d at 744-45.

Demonstrating bias on the part of a witness is traditionally one of the strongest forms of impeachment.

> "No rule is better established than the right to show the bias and prejudice of a witness towards a party to the suit as a part of his cross-examination. His answers are not relevant to the issue, but they do throw a direct light on the credibility of his evidence." Furlong v. United States, 10 F.2d 492 (8th Cir. 1926) at 494.

Bias and interest of the witness are always relevant and can be shown by cross-examination in many ways. It is permissible to show in an assault with a deadly weapon case that the complaining witness has a suit pending for damages for injuries resulting from the alleged assault. Villaroman v. United States, 87 App. D.C. 240, 184 F.2d 261 (1950); or to show a belief on the government witness's part that he would secure immunity or a lighter sentence. Farkas v. U.S., 2 F.2d 644 (6th Cir. 1924); or to show that the witness was the same man who testified against an individual in prior cases, Gibbons v. State, 34 Okl. Crim. 407, 246 P. 1107 (1926); or to show that the testimony of the witness may have been some way influenced by suggestions or statements made by those who interviewed him. U.S. v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963).

These questions that probe for bias or ulterior motive may be asked on cross-examination even though the witness may be entirely innocent of any of the implications inferred from the questions. State v. Aldrich, 75 Ariz. 53, 251 P.2d 653 (1952).

It is clear that the accused may indulge as a matter of right in cross-examination of prosecuting witnesses for the purpose of showing their motives or feelings. King v. United States 112 Fed. 988 (5th Cir. 1902). Although evidence of other criminal acts is not ordinarily admissible, it is admissible to show intent, motive, identity, scheme or plan. U.S. v. Klass, 166 F.2d 373, (3rd. Cir. 1947); U.S. v. Faucett, 115 F.2d 764, (3rd. Cir. 1940). Where the question involved is the motive for testifying falsely, and therefore the state of mind of the prosecuting witness, the evidence is relevant. Farkas v. U.S. supra. Cross examination even on collateral matters is admissible to show a motive to falsify testimony as distinguished from attacking credibility in general. U.S. v. Lester, 248 F.2d 329, (2nd Cir. 1957).

The rule holding that evidence of similar acts or assaults may be received in evidence to show intent, motive, identity, scheme or plan, etc. has been stated as follows:

> "Subject to Rule 47 evidence that a person committed a crime or wrong on a specified occasion is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity,

intent, preparation, plan, knowledge or identity." Rule 55 of the Uniform Rules of Evidence, 4 Jones on Evidence, 1934 (5th ed. 1958).

The chief object of cross-examination is to test the credibility, knowledge, and recollection of the witness. It should be given a wide latitude, particularly in cases involving a witness against a defendant in a criminal prosecution. People v. Watson, 46 Cal.2d. 818, 299 P.2d 243 (1956). A witness on cross-examination may be asked any questions which tend to test his accuracy, veracity or credibility, or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge. State v. Sherry, 64,S.W.2d 238 (Mo. 1933).

Cases have held that specific acts of misconduct not the subject of criminal conviction are admissible to test the credibility of the witness.

Where the defendant, charged with assault by throwing acid, claimed that the acid had been thrown by his daughter because the complainant had made improper advances, evidence of prior similar conduct on the part of the complainant was relevant and shed light on the credibility of the complainant. State v. Smith, ____Mo. ____, 377 S.W.2d 241 (1964).

In another case the appellant was asked on cross-examination if he had not cut other men, and particularly if he had not stabbed a man named Crow. The Court held this proper so long as these antecedents threw light on the credibility of the witness. Pope v. State, 172 Ark. 61, 287 S.W. 747, (1926).

Other cases have held admissible, as affecting credibility, questions concerning prior acts of misconduct such as whether the defendant had recently "stuck up" another warehouse or had not had a fight at yet another and still a 3rd place, Clark v. Commonwealth 269 Ky. 587, 108 S.W.2d 532 (1937); or whether it was the habit of the complaining witness to lose money while drunk and then accuse other people of stealing it, State v. Lewis, 133 N.C. 653, 45 S.E. 521 (1903); or whether the witness had engaged in crooked gambling activities. State v. Fowler, ____Tenn.____, 373 S.W.2d 460 (1963); or whether, in an abortion case, defendant had not fitted other women in the past when they were pregnant. People v. Stuart, 168 Cal. App. 2d 57, 335 P.2d 189 (1959)

In murder prosecutions, impeachment has been allowed to show that defendant had had a recent fight with a 3rd party, the implication being that defendant was the aggressor. Covey v. State, 232 Ark. 79, 334, S.W.2d 648 (1960); or where the defense was accident, that defendant had killed another man one month previously at the same place. Maddox v. State, 217 Ark. 849, 233 S.W.2d 542 (1950).

New York has apparently adopted the rule that a party may interrogate his opponent's witness as to any criminal, vicious, or disgraceful acts in his life for the purpose of impeachment. People v. Capuano, 15 A.D.2d 400, 225 N.Y. S.2d 252, (1962); Tirschwell v. Dolan, 21 A.D.2d 923, 251 N.Y.S.2d 91(1964). It does not matter that the offenses or the acts inquired about are similar in nature and character to the crime for which the defendant is being tried. If it has a bearing on his credibility, the witness or the defendant may be interrogated about them. People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950).

It is worthy of note that the rule that specific acts of wrongdoing may not impeach a witness has an exception in sex cases where the charge is easy to make and more difficult to disprove. It is submitted that this exception is equally applicable in assault cases. The question to complainant, "Did you once before accuse someone else of the very same thing?" is a relevant inquiry on cross-examination in a rape case. People v. Hurlburt, 166 Cal. App.2d 494, 333 P.2d 82 (1959).

Interrogation of the complaining witness as to whether he or she has on other occasions made similar accusations against other persons is permitted on cross-examination. State v. Poston, 199 Ia. 1073, 203 N.W., 257 (1925), People v. Evans, 72 Mich. 367, 40 N.W. 473 (1888). Any direct, competent evidence not too remote in time, showing specific

immoral or unchaste acts and conduct by her with others is admissible. Frank v. State, 150 Neb. 745, 35 N.W.2d 816 (1949); State v. Brooks, 181 Ia. 874, 165 N.W. 194 (1917).

The criminal law recognizes that the known reputation or character of an assailant as to violence and turbulence has a very material bearing on the degree and nature of the apprehension of danger on the part of the person assaulted; also that one who is turbulent and violent may the more readily provoke or assume the aggressive in an encounter.

This court has held, in a murder case, that where there is any evidence of self-defense, evidence of the dangerous character of the deceased is admissible to explain or account for the reasonableness of his apprehension of danger at the time of the fatal encounter. Travers v. U.S., 6 App. D.C. 450 (1895). Furthermore, the element of communication is unnecessary for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. Evans v. U.S., 107 App. D.C. 324, 277 F.2d 354 (1960).

In civil actions for assault and battery where the evidence is conflicting on who the aggressor was, evidence of plaintiff's character or reputation for turbulence or quarrelsomness is admissible even without regard to whether the defendant has pleaded self-defense and even if the defendant did not know of such character or reputation. Cain v. Skillin, 219 Ala. 228,

121 So. 521 (1929).

Nor can it be maintained that the error in this case was harmless. In Lindsey v. U.S., supra, this Court held that "it cannot properly be assumed that the cross-examination would, if the appellant's counsel had been allowed to pursue it, have been unsuccessful in its attack upon the dependability of the evidence supplied through the lips of the experts for the Government.", 177 App.D.C. at 5, 133 F.2d at 372. Moreover, an adverse ruling of the lower court in refusing to allow the interest and bias of the main government witness to be given in evidence, may have compelled or induced the defendant to give evidence in his own case. King v. U.S., supra.

In Evans v. U.S., supra, this Court held that even when three disinterested prosecution witnesses testified that appellant was not alone at the time of the incident and that this adversely affected her credibility, the fact that none of the witnesses could definitely say who started the fight, meant that the proffered evidence of the deceased's aggresiveness might have convinced the jury of her innocence.

But this Court emphasized that even if it convincingly appeared that the excluded testimony could not induce the jury to acquit, evidence suggesting that appellant was not the aggressor might well have induced the jury to convict appellant for the lesser included offense.

CONCLUSION

Because the appellant was greatly prejudiced by the limitations imposed upon his cross-examination in his effort to impeach the **credibility** of the complaining witness, it is respectfully submitted that this constituted reversible error; and therefore, the judgment should be vacated or a new trial should be order.

Marvin J. Brenner
MARVIN J. BRENNER

424 Fifth Street, N.W.
Washington, D.C.

Counsel for Appellant
(Appointed by this Court)

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing brief for Appellant is acknowledged this_____day of February, 1965.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,054

JASPER B. PLOTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
CAROL GARFIEL,
Assistant United States Attorneys.

Cr. No. 792-64

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Appellant was convicted of assault with a dangerous weapon. On cross-examination, defense counsel inquired of the complaining witness whether he had previously engaged in a fracas at the restaurant where the assault occurred and why he was barred from that restaurant. Absent any claim of self-defense, did the trial court properly sustain objections to these questions?

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,054

JASPER B. PLOTT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed August 31, 1964, appellant was charged in two counts with assault with a dangerous weapon (22 D.C. Code 502) and possession of a prohibited weapon, a switchblade knife (22 D.C. Code 3214 (a)). He was tried by a jury on October 8, 1964 and convicted on both counts. By judgment and commitment filed November 16, 1964 appellant was sentenced to imprisonment for a period of two to seven years on the first count and for one year on the second count, the sentences to run concurrently. This appeal followed.

The testimony at trial was clear and undisputed. The jury returned its guilty verdict 32 minutes after receiving the case.

Some time before 9:30 p.m. on the night of July 5, 1964, the appellant, Jasper Plott, entered the Headquarters Restaurant at 1660 Lamont Street, N.W., in the District of Columbia, wearing a ¾ length terry cloth beach robe and bathing trunks (Tr. 40, 48, 51-52, 67, 80, 95). He sat down at a booth with Richard Hillard and two other men and took a closed knife out of his jacket. After opening the knife and having a conversation about it, appellant thrust the knife, still open, down into his trunks. About an inch of the handle of the knife remained exposed to view. (Tr. 52-53, 67.) While appellant appeared to have been drinking, he was not so drunk that he lacked control of himself (Tr. 46-47, 59-60, 73-74).

Robert "Pete" Hickman, the complainant, was sitting by himself at a table in the back of the restaurant. At about 9:30 p.m. he went to the men's room, leaving on his table a pack of cigarettes and two beers that he had just ordered. (Tr. 42-43, 68.) When he returned, he found three strangers at his table, one of whom was the appellant. Another of these men, known only as "Jim", was drinking Pete's beer. (Tr. 43-44, 69, 80.) Jim was substantially larger than Pete Hickman (Tr. 45, 54, 69).

Pete told the men that he thought there was some mistake, that they were at his table; the men replied that they were not. Pete then said they were drinking his beer, to which Jim retorted that Pete didn't have any beer. When Pete reached for his beer, Jim pushed him back, and a fight ensued between the two. (Tr. 44, 69, 81.) Pete and three other witnesses were agreed that in this fight between Pete and Jim only fists were used (Tr. 44-45, 54, 69, 81, 85).

There came a time during this fist fight when Pete had Jim pinned up against either the wall or a cigarette machine or juke box. At this point, according to three witnesses, the appellant came up from behind Pete with the open knife in his hand. The appellant grabbed Pete

around the neck and stuck the knife in Pete's back. (Tr. 45, 54-55, 70-73, 77, 81-83, 89.) Robert Hillard came between appellant and Pete in an attempt to stop the fight, but retreated when the appellant told him to get out of the way or he too would be cut (Tr. 46, 55). Pete and appellant then started fighting, and appellant made free use of his knife (Tr. 46, 55). Finally someone yelled that the police were coming, and the appellant broke away and started out the door (Tr. 56, 83).

Sergeant V. C. Jacob met the appellant coming out of the restaurant and saw him drop a knife (Tr. 91-92). The sergeant picked up this knife, closed it, and later gave it to Private James Kirk (Tr. 36-38, 92-93). This knife became Government's Exhibit 1 in evidence (Tr. 37-38).

Pete Hickman received multiple lacerations and stab wounds on his face and arm, on the top of his head, and in his back (Tr. 46, 61-62, 83). These wounds bled severely (Tr. 35, 48, 83, 95). Because of the amount of bleeding and the large hematoma over the lower of two wounds on Pete's left back, the examining physician suspected that the thoracic cavity might have been penetrated. However, x-rays proved negative in this respect. (Tr. 62-64.)

Appellant's defense consisted of an attempt to show that he could not have been close enough to Pete Hickman to stab him, since appellant's beach jacket, introduced in evidence, showed no sign of bloodstains (See Tr. 40, 48, 58, 84-85). Appellant presented no testimony in his behalf, and this was the only argument made to the jury by his counsel (Tr. 103-04).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 3214(a), provides in pertinent part:

> No person shall within the District of Columbia possess . . . any instrument or weapon of the kind commonly known as a . . . switch-blade knife. . . .

SUMMARY OF ARGUMENT

Appellant was convicted of an assault with a dangerous weapon during a fight in a restaurant. He made no claim that he acted in self-defense. The trial court therefore properly sustained objections to two questions posed to the complaining witness on cross-examination, first, whether the witness had previously engaged in a fracas at that restaurant, and, second, why he was barred from the restaurant. Since there was no claim of self-defense, the complainant's reputation for aggressiveness was irrelevant to the substantive issues before the jury. Neither question was designed to show bias on the part of the complainant or that he had a motive to testify falsely, and prior bad acts not amounting to a conviction cannot be used for impeachment in the federal courts.

ARGUMENT

The trial court did not unduly restrict appellant's right of cross-examination.

(Tr. 49-50)

Appellant's only contention in this Court is that his right of cross-examination was unduly restricted because the trial court sustained objections to two questions posed to the complaining witness by defense counsel. Neither in the court below nor in his brief on appeal does appellant specify why he claims these questions were proper cross-examination. By the first of these questions defense counsel apparently hoped to show that the complainant, Pete Hickman, was an aggressive person. Counsel inquired of the witness, "Is this the first time you were ever engaged

in a fracas at that particular—." Government counsel's objection on the ground that "any other matter would have no bearing on this" was sustained. (Tr. 49.) Hickman then testified that while he had been to the restaurant prior to the day of the assault involved in this case, he had not been back since, first, because he was barred and, second, because he did not like the company. An objection to defense counsel's question "Why are you barred from there" was sustained. (Tr. 49-50.) Appellee can perceive no possible relevance that this second question might have to the issues in the instant case.

The extent of cross-examination is within the discretion of the trial court, and reversal is justified only where there has been an abuse of this discretion. *E.g.*, *Collazo* v. *United States*, 90 U.S. App. D.C. 240, 251-53, 196 F.2d 573, 583-85, *cert. denied*, 343 U.S. 968 (1952); *Wright* v. *United States*, 87 U.S. App. D.C. 67, 183 F.2d 821 (1950). In the instant case neither question to which objection was sustained related to the subject matter of the direct examination of the witness. Defense counsel did not suggest to the court the theory on which he considered his questions proper. In these circumstances, it was not an abuse of discretion to sustain the prosecutor's objections. *United States* v. *Bender*, 218 F.2d 869 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955).

The theory on which appellant contends these questions were proper remains unclear in this Court. Whether the complaining witness had previously engaged in fights at the Headquarters Restaurant was irrelevant to the substantive issue in the case, that is, whether appellant had assaulted the complainant, since appellant did not contend that he acted to protect himself against an attack by Hickman. Where there is no foundation in the evidence for a claim of self-defense, testimony as to a victim's reputation for viciousness is properly excluded. *Travers* v. *United States*, 6 App. D.C. 450 (1895). Every witness to the fight in the Headquarters Restaurant who testified at the trial of this case stated without hesitation that the appellant came up behind the complainant and, without

provocation, knifed him in the back. *Evans* v. *United States*, 107 U.S. App. D.C. 324, 277 F.2d 354 (1960), relied on by appellant, is therefore distinguishable. In the *Evans* case, the defendant testified that she had struck in self-defense and the testimony of the government witnesses as to who started the fight was unclear. In those circumstances, the Court held it error to exclude evidence of the victim's reputation for aggressiveness, since this might have bolstered the defendant's claim of self-defense.

That the complainant had engaged in other fights would not tend to show any bias against this appellant or any motive Hickman might have had to testify falsely. The jury was aware that this witness claimed that he had been severely injured by the appellant and therefore that he might bear some ill will against his assailant. Appellant cites many state cases in which testimony as to prior bad acts not amounting to a conviction of felony was permitted to impeach the credibility of a witness. Suffice it to say that such is not the rule in the federal courts. *E.g.*, *Sanford* v. *United States*, 69 App. D.C. 44, 98 F.2d 325 (1938); *United States* v. *Provoo*, 215 F.2d 531 (2d Cir. 1954).[1]

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[1] While Hickman's testimony that he saw a knife in appellant's hand (Tr. 45) was relevant to the second count in the indictment, charging possession of a prohibited weapon, that count was amply and primarily proven by the testimony of the witnesses Hillard, Zerboe, Bell, and Jacob (Tr. 52-53, 55, 67, 70, 82, 89, 91-93). The conviction on this second count must therefore be affirmed in any event.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
CAROL GARFIEL,
Assistant United States Attorneys.

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